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No. 82-502

In the Supreme Court of the United States

October Term, 1982

PALLAS SHIPPING AGENCY, LTD.,
Petitioner,

vs.

JOSEPH DURIS,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

REPLY BRIEF OF PETITIONER

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

REPLY BRIEF OF PETITIONER

PRELIMINARY STATEMENT

After the filing of the Brief of Petitioner, copies of various documents relating to Respondent's claim for compensation and filed in the Office of Workers Compensation Programs, Department of Labor, were received from the Department of Labor. These documents show that by letter dated June 13, 1975, to the OWCP, Joseph Duris appointed William Culbert as his attorney for the compensation claim (Exhibit 1).[1] Thereafter, a formal com-

1. Exhibits 1-7 were obtained by Petitioner from the Department of Labor (OWCP) in March 1983. Although requested, they were not made available to Petitioner prior to that time. Accordingly, these documents have been included as an appendix to this Brief in order to provide the Court with a complete view of the compensation proceedings.

pensation claim dated November 13, 1975, but marked received by the OWCP on February 11, 1976, was filed (Exhibit 2). On the same day, a notice was sent by the OWCP to the employer that a claim had been filed (Exhibit 3). On August 19, 1976, the deputy commissioner held a conference and by memo dated September 2, 1976, recited the discussion at the conference, recommended the continued payment of compensation and requested certain medical reports (Exhibit 4). This memorandum was sent to the claimant, his attorney and the compensation insurer. The compensation benefits were paid and accepted pursuant to this memorandum through April 21, 1977 (Exhibit A annexed to Brief of Respondent). The significance of these items to the question presented here is discussed in Point V.

Three additional conferences were held in February 1977, September 1979 and October 1980 (Exhibits 5, 6 and 7). The memoranda filed as a result of these conferences indicate that plaintiff was returning to work and that plaintiff wished to hold the claim in abeyance pending a third-party lawsuit. An agreement was eventually reached on permanent partial disability benefits.

ARGUMENT

I. THE PRIMARY ISSUE IN THIS LITIGATION IS WHETHER THE "AWARD IN A COMPENSATION ORDER" PROVISION IN 33 U.S.C. § 933(b) IS SATISFIED BY AN "ACT OF RATIFICATION OF COMPENSATION AND THE SUBSEQUENT ACCEPTANCE OF COMPENSATION" BY THIS RESPONDENT.

(a) Contrary to the Contentions of the Respondent and the Briefs Amici Curiae, Filed Herein on His Behalf, the Procedural Requirements for Assignment Under 33 U.S.C. § 933(b) Were Satisfied in This Case.

The Court below held that the "mere receipt of compensation benefits under the Act does not trigger the assignment provision of section 33(b)" (Joint App. 46). In urging affirmance of that ruling, the Respondent not only sets forth in his "Questions Presented" but in the argument that follows his contention that "mere receipt of compensation does not trigger the assignment provisions of section 33(b)" (Resp. Br. 1, 2). The same contention appears in the Amici Curiae brief filed on behalf of the Association of Trial Lawyers of America (Br. 6).

It should be clear from Petitioner's Brief that it is unnecessary to decide in this case whether the acceptance of compensation benefits alone triggers the six-month provision of Section 33(b) of the Act. It is stated there and reaffirmed here that compensation for temporary total disability was paid and accepted from May 20, 1975 through April 21, 1977. The payment and acceptance was reported to the Department of Labor by the filing of the LS-206 (Joint App. p. 46) dated June 2, 1975 and the termination

was reported by the L.S. 208 dated April 29, 1977 (Exhibit A to Brief of Respondent). The six-month period was triggered if not by the initial payment of compensation, then by the filing of claim under Section 19 (33 U.S.C.A. § 919) of the Act, or by the Deputy Commissioner's approval in writing on September 2, 1975, of the payment of compensation, or at the latest by the filing of the LS-208 showing the termination of temporary total disability benefits. All of these actions occurred three years or more before the commencement of this lawsuit.

As recently as December 13, 1982, the United States District Court for the Southern District of Texas considered the award question and ruled that recognition by the employer's insurance carrier of the longshoreman's right to compensation, the carrier's filing of the notice of payment of compensation and the longshoreman's acceptance of the first compensation payment constituted an "award in a compensation order" for the purpose of Section 33(b) of the Longshoremen's and Harbor Workers' Compensation Act, *Williamson v. M/V Sandra Wesch*, 552 F. Supp. 852 (S.D. Tex. 1982). In granting the defendant's motion to dismiss, the Court declined to follow the Sixth Circuit's *Duris* opinion. *Id.* at 854. The Court adopted the Fourth Circuit rule and after reviewing the decisions stated:

> "These courts have articulated the policy underlying the *Simmons* rule contending that it will advance the welfare of longshoremen by:
>
> 1. fostering the prompt payment of benefits by the employer or its insurance carrier since an employer will not have to perfunctorily controvert each claim filed to assure an assignment;
>
> 2. allowing the longshoreman six months after he first receives compensation to assess his options; and

3. eliminating the delay and expense of litigation that would occur if every longshoreman's claim was controverted."

Finally, the Court stated (p. 855):

> *"This court agrees with the above stated rationale and is convinced that the rule it adopts today will promote the interest of both the longshoreman and his employer while furthering the purposes of the LHWCA."*

This case and others from *Toomey v. Waterman S.S.*, 123 F.2d 718 (2d Cir. 1941), through *Simmons v. Sea-Land Services*, 676 F.2d 106 (4th Cir. 1982), *cert. denied*, 103 S. Ct. 242 (1982), recognized the necessity to interpret Section 33 in light of the realities of administrative practice and in furtherance of the Congressional policy.

II. THE RESPONDENT CONCEDES THAT THE FACTS IN LIBERTY MUTUAL INSURANCE CO. V. AMETA & CO., 564 F.2d 1097 (4TH CIR. 1977), AND IN THE CASE AT BAR ARE STRIKINGLY SIMILAR AND THAT THE COURT IN THAT CASE WAS CONFRONTED BY AN ISSUE IDENTICAL WITH THE ONE RAISED HEREIN (RESP. BR. 20).

It is obvious, in *Ameta, supra*, that the issue as to whether every claim must be controverted by the employer in order to protect its lien rights was not before the Court nor necessary to its decision and that its statements in that connection were, as conceded by the Respondent, purely *dicta* (Resp. Br. 22). The Court's ruling was not based upon "an inaccurate and misleading fact" (Resp. Br. 22) but upon its interpretation of the meaning of the phrase "an award in a compensation order." It remains a persuasive authority for the fundamental pro-

position that the *formal* entry of an award is not necessary to trigger the statutory assignment of the rights of the longshoreman.

The Respondent asserts that *Larson v. Associated Containers Transportation (Australia) Ltd.*, 459 F. Supp. 561 (E.D. Va. 1978), and *Simmons v. Sea-Land Services*, 676 F.2d 106 (4th Cir. 1982), are not persuasive because they are founded upon "inaccurate assumptions" and "do not follow the legislative purpose or interpret the Act as a whole." (Resp. Br. 20, 21).

The Respondent has failed to set forth the "inaccurate assumptions " upon which *Larson* and *Simmons* are allegedly based and it should be pointed out that in *Ameta, Larson* and *Simmons* the principal issue was not an interpretation of LHWCA as a whole, but an interpretation of the phrase "an award in a compensation order" as found in Section 33(b) of that statute. That, also, is the primary issue in this case before this Court.

We respectfully suggest that this issue is not only before this Court for definitive determination but a guide should be given to the lower federal courts concerning the commencement of the six-month period during which the longshoreman must file suit against the third-party tortfeasor. The decisions in the courts below on this issue have not been uniform. Some have chosen the first receipt of compensation as the starting date. Others have specified that the time begins to run when the payments have been terminated. In the instant case the third-party suit was filed well beyond the six-month period as it relates either to the commencement or termination of payments. It is our belief, however, that in order to give the longshoreman as much time as possible to exercise his option one possibility that could be considered is that the termination of payments (as reflected by LS-

208) should be selected as the starting point. The interests of the longshoreman in that connection has been the basis of the amendments of the Act which took place in 1938 and 1959.

On February 25, 1983 (subsequent to the filing of all briefs in this litigation), a Compensation Order Award of Compensation was made in this case by the Acting Deputy Commissioner. A copy of the Order and Award, together with the Certificate of Filing and Service, are attached to the Respondent's Supplemental Brief as Appendix C. Under the Award the Respondent herein is to receive a total of $38,537.77 compensation benefits, less the $7,516.65 already paid, leaving a net amount of $31,021.12 to be paid.

It should be pointed out that the Award also provides for a fee of $5,036.51 to William Culbert, attorney at law, "for services rendered on behalf of the claimant, such sum to be a lien upon and to be paid from this award."

The award to Mr. Culbert should remove any doubt as to whether the Respondent was receiving expert legal assistance during the period when he was required to exercise his option to file the third-party suit.

Even if the Respondent had not, as he did, secured the services of a lawyer familiar with the practice and procedure under the Longshoremen's and Harbor Workers' Compensation Act, that Act provides for the furnishing, upon request, of assistance and information relating to the Act's coverage and compensation. Section 939(c)(1) of the Act provides as follows:

> "The Secretary shall, upon request, provide persons covered by this Act with information and assistance relating to the Act's coverage and compensation and the procedures for obtaining such compensation

including acceptance in processing a claim. *The Secretary may, upon request, provide persons covered by this Act with legal assistance in processing a claim.* * * *" (1972 Amendments) (Emphasis supplied).

To suggest, in light of the above, that the Respondent's interests have not been protected throughout this litigation and that he was "forced to proceed in the dark" is to refuse to concede the obvious.

Thus, whether the rationale of the Fourth Circuit decisions is accepted, or the somewhat more restricted reasoning of the Second Circuit decisions is held to be controlling, the events in the instant case amount to an "award in a compensation order."

III. THE CONFLICT OF INTEREST ISSUE WAS NOT IN THIS CASE UNTIL BROUGHT INTO IT BY THE COURT BELOW. IT HAD A CONTROLLING INFLUENCE ON THAT COURT'S DECISION.

We agree with the Respondent that the conflict of interest was not initially in this case (Resp. Br. 30, 31). The relationship between the Respondent and his employer was, as stated in Petitioner's Brief at page 36, the normal, classical relationship between those parties. To urge, however, as does the Respondent, that the well known disinclination of the employer to sue his customer, the shipowner, played no part in the decision of the Court below is to disregard the plain meaning of the language used by the Court (Resp. Br. 33).

The Court below began its discussion of the conflict of interest issue by alluding to *"the very real threat of conflicting interests between employer and employee"* (Joint App. 45). Further, on the same page, and during its dis-

cussion of the relationship between the parties, the Court states that the dependence of the employer-assignee on the shipowner or charterer for future business reduces the probability that it will operate to protect the rights of the injured employee. Finally, on that point it states (Joint App. 45):

> "This conflict of interest problems makes us hesitate to countenance an interpretation of the Act which would expand the assignment provisions of section 33."

In light of the above, to assert that the conflict of interest issue was not part of the decision below is to fail to recognize the plain meaning of the words used by the Court.

The Court below not only hesitated to "expand the assignment provisions of section 33" of the Act but adopted the restrictive interpretation because of its misconception of the conflict of interest picture and its feeling that an expanded interpretation would leave the Respondent's interests unprotected.

IV. THE EXISTENCE OR NONEXISTENCE OF A NONSTATUTORY ACTION BY THE EMPLOYER-ASSIGNEE AGAINST A THIRD-PARTY TORTFEASOR IS NOT AN ISSUE IN THIS LITIGATION. THE DECISION OF THIS COURT IN THE BURNSIDE CASE IS NOT ONLY IRRELEVANT BUT THE VIABILITY OF THAT DECISION, IN LIGHT OF 1972 AMENDMENTS, IS QUESTIONABLE.

In two of the three amici curiae briefs which have been filed herein in support of the Respondent the argument is advanced that the existence of a cause of action, under the General Maritime Law, by the employer-assignee against

a negligent tortfeasor, as set forth in the case of *Federal Marine Terminals, Inc. v. Burnside Shipping Co.*, 394 U.S. 404 (1969), renders unnecessary the statutory assignment of the third-party claim (Br. Association of Trial Lawyers of America, 32, 45 and Br. United States of America, 3, 19).

Before discussing this matter any further, it should be pointed out that the Brief of Respondent contains no reference to the *Burnside* decision nor to the existence or nonexistence of a cause of action under the General Maritime Law on behalf of the employer/assignee and against the alleged third-party tortfeasor. The failure of the Respondent, as one of the central figures in this litigation, to rely upon *Burnside* and the principle for which it stands, is an implicit recognition of the nonrelevancy of that principle in this case. We again repeat that the controlling issue before this Court is whether the assignment provisions of Section 33(b) have or have not been satisfied. The existence or nonexistence of a nonstatutory cause of action has no bearing upon that issue.

The question of the effect of the 1972 Amendments of LHWCA on *Burnside* and erroneous reliance upon that decision by the Court below is discussed in detail in the brief filed on behalf of the Petitioner by thirteen American flag steamship companies (Br. 17, 18, 19). No useful purpose would be served by repeating those arguments here. Suffice it to say that they establish, in the absence of definitive authority, that the 1972 Amendments have rendered the viability of *Burnside* highly questionable.

The pertinent provisions of 33 U.S.C.A. § 905(b) as amended in 1972 are as follows:

> "(b) In the event of injury to a person covered under this chapter caused by the negligence of a vessel, then such person, or anyone otherwise entitled to re-

cover damages by reason thereof, *may bring an action against such vessel as a third party in accordance with the provisions of section 933 of this title, and the employer shall not be liable to the vessel for such damages directly or indirectly and any agreements or warranties to the contrary shall be void.* * * * *The liability of the vessel under this subsection shall not be based upon the warranty of seaworthiness or a breach thereof at the time the injury occurred. The remedy in this subsection shall be exclusive of all other remedies against the vessel except remedies available under this chapter.*" (Emphasis supplied.)

The subsection 33 U.S.C.A. § 905 bears the legend, "Exclusiveness of liability" which emphasizes the nature of the remedy which it affords.

In considering the effect of the 1972 Amendments, this Court in *Rodriguez v. Compass Shipping Co., Ltd.*, 101 S. Ct. 1945, at 1957, stated:

"Three of the 1972 Amendments are pertinent. *First, the level of benefits was substantially increased,* thereby increasing the likelihood that the statutory compensation recoverable without proof of fault would be adequate. *Second, the shipowner's right to seek indemnity from the stevedore under Ryan Stevedoring was eliminated, thereby removing a category of litigation from the courts, placing more definite limits on the stevedore's insurance costs, and removing a potential source of conflict between the interests of employers and employees. Third, the shipowner's nearly absolute liability for unseaworthiness was eliminated, thereby further narrowing the area of potential litigation and increasing the relative importance of statutory awards as the favored method of compensation.* * * *" (Emphasis supplied.)

Federal maritime law may have recognized a direct tort action against the shipowner to recover the amount of compensation benefits occasioned by the shipowner's negligence, as set forth in *Burnside, supra,* but Congress, in the 1972 Amendments, seems to have effectively eliminated that remedy.

The United States Court of Appeals for the Second Circuit, an experienced admiralty tribunal, in discussing *Burnside* in light of the 1972 Amendments, did not decide the exclusivity features of 33 U.S.C. § 905(b) but gave a clear indication of its views on that matter. It said in *Landon v. Lief Hoegh & Co.,* 521 F.2d 756 at 761 (2d Cir. 1975), *cert. denied,* 423 U.S. 1053 (1976):

> "It may be, too, that a *Burnside* type of action no longer exists in light of the provision that 'the remedy provided in this subsection shall be exclusive of all other remedies against the vessel except remedies available under this chapter.' 33 U.S.C. § 905(b). But that is a question we need not decide."

Under the double attack of irrelevancy and the effect of the 1972 Amendments, the viability of *Burnside* in the instant case is, at best, questionable.

V. RESPONDENT AND ITS AMICI, INCLUDING THE UNITED STATES, FAIL TO UNDERSTAND THE IMPACT OF § 919(c) OF THE ACT AND HOW IT AFFECTS THE OVERALL SCHEME OF ADMINISTRATION.

All parties to this litigation would agree that one of the primary purposes of the Act is to get compensation into the hands of the longshoreman at the earliest possible time following his injury. Indeed § 914(a) so states. An examination of the Act as a whole also clearly reveals

the intention of Congress to set up a compensation procedure which will insure promptness in the handling of claims and in decisions by administrative officials. Under Section 939(a), the Secretary of Labor is directed to administer the Act and authorized to promulgate rules and regulations as may be necessary (33 U.S.C.A. § 939(a)).

The brief of the United States (Br. 4) discusses § 919(c)[2] but only with respect to the first portion of that statute which, they allege, requires contested claims, if carried to formal hearings, to result in the issuance of formal compensation orders. So, too, the Unions, at pp. 22-23 of their Brief Amicus, read Section 919(c) as if it is limited to contested claims requiring a hearing. Respondent refers to the statute in a general manner (Resp. Br. 16), also suggesting that it is limited to contested claims. Both Respondent and the United States do, however, make the point that the employer could have obtained an award by controverting the claim (Resp. Br. 19) or by requesting it under the regulations (U.S. Br. 18).[3]

Petitioner suggests that the last sentence of § 919(c) must be considered not only with respect to its other

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2. § 919(a), (b) and (c) reprinted in Appendix pp. A1-A2.

3. The citation to regulations by the United States is incorrect. The regulations governing Duris's claim filed in 1975 or 1976 (Ex. 1 and 2) are found at 38 F. Reg. 26860 (Sept. 26, 1973). The regulations referred to by the United States did not take effect until September 1977. 42 F. Reg. 45330 (Sept. 9, 1977). Contrary to the suggestion of the United States at page 4, note 3, of its brief, 20 C.F.R. 702.312 (1976) made the claims examiner the designee of the deputy commissioner for all purposes, *Rodriguez v. Compass Shipping Co., Ltd.*, 617 F.2d 955 (2d Cir. 1980), *aff'd*, 451 U.S. 596 (1981) including the issuance of compensation orders. So, too, 20 C.F.R. 702.315 (1976) directed that upon reaching agreement a formal compensation order *shall* be prepared. Requests for compensation orders are not provided for in the regulations, apparently because the statute itself commands issuance of the order. The amended regulations cited by the United States and other Amici do not change the substantive rights of the parties. *Ambrosino v. Transoceanic S.S. Co., Ltd.*, 675 F.2d 470 (2d Cir. 1982).

subsections but other sections of the Act as well. The impact of this statute was ably discussed by shipowner's Amici (Br. 12-17). We wish to elaborate on that discussion as it pertains to the Duris case, Respondent's contentions and the overall scheme of the Act.

Mr. Duris was injured on May 19, 1975 (Resp. Br. 37). By virtue of § 914(b), the first installment of compensation was required to be paid 14 days after the injury and was, in fact, so paid (Resp. Br. 37). Thereafter, in accordance with § 914(c), the employer's insurance carrier filed Form LS-206 on June 2, 1975 (Joint App. 48).

In addition to the report forms which the employer is required to file with the Department of Labor, § 913(a) and § 919 contemplate the filing of a "claim" by the claimant "at any time after the first seven days of disability following an injury, or at any time after death" (§ 919(a)). The claim may be made either by formal document, Form LS-203 (Exh. 2), or informally by letter (Exh. 1). In the Duris case both an informal[4] and a formal claim were filed with the Deputy Commissioner. The informal claim letter is dated June 13, 1975, and the LS-203 November 13, 1975.[5]

Within 10 days after the claim is filed the Deputy Commissioner, pursuant to § 919(b), is required to notify the employer that a claim has been filed. Such Notice

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4. We are advised by the Department of Labor's Office in Chicago that this form of claim is known as a "de facto" claim inasmuch as the official form was not used initially. As to the propriety of this type of informal claim, see *Employers Liability Assurance Corp. Ltd. v. P. J. Donovan, Dep. Comm.*, 279 F.2d 76 (5th Cir. 1960) and *Atlantic & Gulf Stevedores, Inc. v. P. J. Donovan, Dep. Comm.*, 279 F.2d 75 (5th Cir. 1960).

5. This form is time-stamped by the Department of Labor on February 11, 1976, which is no doubt the correct date of receipt by the Department of Labor for reasons which will appear with regard to the Department's forwarding of the "Notice to Employer," *infra*.

(Exh. 3) was given to the employer by the Department of Labor in the Duris matter on February 11, 1976, the same date that the formal claim, LS-203, was recorded as being received.

Section 919(c) of the Act then requires the Deputy Commissioner to conduct, "or cause to be made," such investigation as he considers necessary with respect to every claim and, upon *application*, to order a hearing. After stating the notice aspects with respect to a hearing, this subsection then proceeds:

> "* * * If *no* hearing is *ordered* within 20 days after notice is given as provided in subdivision (b), the Deputy Commissioner *shall* by *order* reject the claim or make an *award* in respect of the claim." (Emphasis supplied.)

By virtue of § 914(d), and as stated in the Department's Notice to the Employer (Exh. 3) specified in § 919(b), the employer has 14 days in which to controvert the claim. If the claim is not controverted, as was the case in Duris, then the Deputy Commissioner was required by the aforementioned quote from § 919(c) to order an award within 20 days (30 days if one considers the 10 days regarding Notice to the Employer), or after the expiration of the time in which the claim could be controverted.

It therefore becomes evident and in line with the Act's expeditious and informal handling of claims that in each and every case where payments are made voluntarily (and they may well continue to be so paid) they must, absent an immediate contravention at the inception of the case, start "without an award." Following acceptance of the compensation by the claimant, and the filing of his formal or informal "claim," investigation by the Deputy Commissioner and notice to the employer, an award with

respect to the compensation *must* follow and absent contravention must follow within 20 days of the Notice to Employer (Exh. 3). The required order (Exh. 4)[6] was made in this case without the need for drawing forms of compensation orders by virtue of 20 C.F.R. 702.231, .311 and .315 (1976) promulgated by the Secretary under his § 939 authority to administer the Act. These regulations required,

> "Unless the employer controverts his liability to pay compensation under the Act, he shall pay periodically, promptly and directly to the person entitled thereto the benefits prescribed by the Act." (20 C.F.R. 702.231 (1975-76).)

The Deputy Commissioner was in turn directed to resolve any disputes by telephone or other expeditious means and the employer was required to make immediate payment upon becoming aware of the agreement, and without regard to the receipt of the formal compensation order. 20 C.F.R. 702.311, 315(a) (1975-76). Clearly, the critical event is agreement and the formal compensation order is nothing more than formality.

In addition, the Deputy Commissioner on August 19, 1976, convened a conference and issued a memorandum order (Exh. 4), copy of which was forwarded to both Mr. Duris and his attorney, recommending the continuance of the compensation payments. It is to be noted that a third-party action was contemplated and apparently discussed. Although payments of compensation to Duris continued to be made voluntarily by the employer's carrier, such payments from and after August 19, 1976, were now being made pursuant to an award in a compensation order is-

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6. See *Barulec v. Skou*, 471 F. Supp. 358 (S.D.N.Y. 1979) at p. 360, *aff'd*, 622 F.2d 572 (2d Cir. 1980), *aff'd*, 451 U.S. 596 (1981), and cases cited therein.

sued by the Deputy Commissioner, thus triggering the six-month assignment provision of § 933(b). At this time Mr. Duris was fully aware that he was receiving temporary total disability payments of a fixed amount which would continue until he was able to return to work. He also knew from the provisions of the Act that if, as a result of the injury, he sustained any permanent partial or total disability he would receive additional compensation based on the provisions of § 908.

After one additional conference held on February 17, 1977 (Exh. 5), Duris returned to work in April 1977. On April 29, 1977, the employer's carrier filed LS-208 with the Department of Labor (copy to Duris) (Ex. A and B - Resp. Br. 37, 38), indicating the last payment of temporary total disability compensation had been made on April 21, 1977, and that "Compensation Was Stopped Or Suspended."

The handling of this claim demonstrates both the informality necessary to accomplish the Act's contemplated purpose of expeditious claim resolution and the actual practice of the OWCP. Formal orders are simply unnecessary once agreement is reached between the parties, because of the regulations applicable to every case. Indeed, waiting for a formal final determination such as the one entered here in February 1983, eight years after the accident, effectively nullifies Sections 33(b) and 19(c), thereby violating the rights of interested parties. (See *Liberty Mutual Insurance Company v. United States,* 290 F.2d 257 (2d Cir. 1961).)

In summary, the Act contemplates that in every case claim, compensation will be paid voluntarily and without an award initially, but absent controversion, within 30 days of the claim, an appropriate order will issue and payment will be made thereunder. The regulations effecting this scheme must be interpreted to constitute the award, at

least for Section 33(b) purposes. To do otherwise would bar an assignment in the vast majority of cases (see lodgings accompanying shipowner's amicus brief) and render meaningless the language contained in Section 33(b). Indeed, this Court in *Czaplicki v. The Hoegh Silvercloud, et al.*, 351 U.S. 525 (1956), recognized the validity of a Section 919(c) award as effecting an assignment at 351 U.S. at page 528 (footnote 9).

Certainly more than one award can occur in any particular case (see, for example, § 907(d)) but in each and every case, except those involving no lost time, an award, be it formal or informal, is contemplated by the statute. We submit this is precisely what the *Simmons, supra,* Court had in mind when faced with reviewing some eight cases which included just about all levels of compensation payments and awards. It obviously felt compelled, consistent with the provisions of the Act, to define when an award in a compensation order was created. It proceeded to do so with the admonition that "the award must serve the dual purpose of protecting the welfare and rights of the longshoreman while not unduly delaying the employer's access to relief from negligent third parties." *Simmons, supra,* p. 109. We submit that the three events specified by the *Simmons* Court in defining an award not only fulfill the dual purpose which it sought to achieve, but the overall intent of the statutory provisions as well. In addition, this definition has the distinct advantage of setting a definite date in each case based upon the filing and acknowledgment of the required forms, copies of which are provided to the claimant. As noted earlier, however, for purposes of the instant case it is sufficient to note that not only the employer notices, but also the employee's "claim", a memorandum of the Deputy Commissioner and the LS-208 were all filed three years or more before the commencement of this lawsuit.

CONCLUSION

For the reasons set forth in the Petitioner's original brief and this reply brief, it is submitted that the decision of the United States Court of Appeals is erroneous; that it should be reversed and the complaint dismissed.

Respectfully submitted,

LUCIAN Y. RAY
WILLIAM D. CARLE III, *Counsel of Record*
DOUGLAS R. DENNY
RAY, ROBINSON, HANNINEN & CARLE
1050 Union Commerce Building
Cleveland, Ohio 44115
(216) 861-4533
Attorneys for Pallas Shipping Agency, Ltd., Petitioner

APPENDIX

33 USCA § 919 PROCEDURE IN RESPECT OF CLAIMS

Filing of claim

(a) Subject to the provisions of section 913 of this title a claim for compensation may be filed with the deputy commissioner in accordance with regulations prescribed by the Secretary at any time after the first seven days of disability following any injury, or at any time after death, and the deputy commissioner shall have full power and authority to hear and determine all questions in respect of such claim.

Notice of claim

(b) Within ten days after such claim is filed the deputy commissioner, in accordance with regulations prescribed by the Secretary, shall notify the employer and any other person (other than the claimant), whom the deputy commissioner considers an interested party, that a claim has been filed. Such notice may be served personally upon the employer or other person, or sent to such employer or person by registered mail.

Investigations; order for hearing; notice; rejection or award

(c) The deputy commissioner shall make or cause to be made such investigations as he considers necessary in respect of the claim, and upon application of any interested party shall order a hearing thereon. If a hearing on such claim is ordered the deputy commissioner shall give the claimant and other interested parties at least ten days'

notice of such hearing, served personally upon the claimant and other interested parties or sent to such claimant and other interested parties by registered mail or by certified mail, and shall within twenty days after such hearing is had, by order, reject the claim or make an award in respect of the claim. If no hearing is ordered within twenty days after notice is given as provided in subdivision (b) of this section, the deputy commissioner shall, by order, reject the claim or make an award in respect of the claim.

A3

Exhibit 1

June 13, 1975

U.S. Department of Labor
Bureau of Employees Compensation
Office of Workmen's Compensation Program
Federal Building
Cleveland, Ohio 44199

9-4012-

Gentlemen:

I hereby authorize William M. Culbert, Attorney-at-Law, 609 Security Building, Toledo, Ohio 43604, to represent me in my claim for injuries suffered on or about 5-19-75 while employed at the Toledo Overseas Terminal, Inc., Toledo, Ohio.

Yours very truly,

✓ Joseph E. Duris

Joseph E. Duris

Social Security No. 279-30-9882

Culbert came in to office & executed file. I gave him 203's & file. He has admiralty as another attorney ltr 8/1/75

A4

Exhibit 2

4

U. S. DEPARTMENT OF LABOR
Employment Standards Administration
Office of Workmen's Compensation Programs

EMPLOYEE'S CLAIM FOR COMPENSATION

CASE NUMBER: 9-4012

SEE INSTRUCTIONS ON REVERSE

1. NAME OF INJURED EMPLOYEE (TYPE OR PRINT): FIRST NAME: Joseph; MIDDLE INITIAL: E.; LAST NAME: Duris

4. DATE OF INJURY: 5-19-75

5. EMPLOYEE'S ADDRESS (Number, street, city, State, zip code): 1218 Hirzel Street, Toledo, Ohio 43605

6. [ ] MARRIED [X] SINGLE

7. SEX: [X] MALE [ ] FEMALE

8. AGE OR DATE OF BIRTH: 2-27-39

9. SOCIAL SECURITY NUMBER: 279 : 30 : 9882

10. ON DATE OF INJURY GIVE: a. HOUR BEGAN WORK: 8 A. M.; b. HOUR OF ACCIDENT: 10:05 A. M.; c. DID YOU STOP WORK ON THIS DAY? [X] YES [ ] NO

12. DATE AND HOUR YOU RETURNED TO WORK: Have not

13. OCCUPATION (Job title, type of work done, duties, etc.): Signalman

14. NUMBER OF YEARS IN THIS OCCUPATION: 15

16. WAGES OR EARNINGS (Include overtime allowances, etc.): a. WEEKLY

17. INJURED WHILE DOING REGULAR WORK? [X] YES [ ] NO

18. HOW MANY YEARS HAVE YOU WORKED FOR THIS EMPLOYER? 1 1/2; b. NUMBER OF DAYS USUALLY WORKED PER WEEK

19. NAME OF FOREMAN OR SUPERVISOR AT TIME OF ACCIDENT: John Nyers

21. EARLIEST DATE YOU WORKED FOR EMPLOYER UNDER THIS OCCUPATION: 5-19-75

22. WERE YOU EMPLOYED ELSEWHERE DURING THE WEEK YOU WERE INJURED? [ ] YES [X] NO

23. EXACT PLACE WHERE ACCIDENT OCCURRED (Street address, city, town, Name of vessel, pier, terminal, etc.): Vessel REGENT BOTAN, docked at Toledo Overseas Terminal, 3319 St. Lawrence Drive, Toledo, Ohio 43605.

24. DESCRIBE IN FULL HOW THE ACCIDENT OCCURRED (Relate the events which resulted in the injury or occupational disease. Tell what the injured was doing at the time of the accident. Tell what happened and how it happened. Name any objects or substances involved and tell how they were involved. Give full details on all factors which led or contributed to the accident. If more space is needed, continue on other side.)

Leaving vessel, climbed up stairway on deck, turned, started down jacobsladder while holding onto arms of stairway; stairway was not secured and gave way, causing me to fall 20-25 feet to dock.

25. NATURE OF INJURY (Name part of body affected--fractured left leg, bruised right thumb, etc. If there was a loss of a part of the body, describe.): Multiple injuries - Fractured right wrist and left ankle and back - injured both feet, right shoulder and head - possible internal injuries.

26. HAVE YOU RECEIVED MEDICAL ATTENTION FOR THIS INJURY? [X] YES [ ] NO (If "YES" give name and address of doctor, clinic, hospital, etc.)
Drs. Gosman, Rosenblatt & Boucouras
2321 Upton Avenue, Toledo, Ohio 43606
Guy W. Talmadge, M. D., 859 East Broadway, Toledo, Ohio 43605
Riverside Hospital, Toledo, Ohio 43604

27. WAS SUCH TREATMENT PROVIDED BY EMPLOYER? [ ] YES [X] NO

28. ARE YOU STILL DISABLED ON ACCOUNT OF THIS INJURY? [X] YES [ ] NO

29. HAVE YOU DONE ANY WORK FOR PAY OR PROFIT SINCE PERIOD OF DISABILITY? [ ] YES [X] NO

30. HAVE YOU RECEIVED ANY WAGES SINCE BECOMING DISABLED? [X] YES [ ] NO (If "Yes," give dates on back)

31. WAS INJURY RESULTED IN PERMANENT DISABILITY OR IMPAIRMENT? [ ] YES [ ] NO (If "Yes," describe or explain)

32. NAME OF EMPLOYER (Individual or firm name): Toledo Overseas Terminal, Inc.

33. NATURE OF EMPLOYER'S BUSINESS: Marine Terminal

34. ADDRESS OF EMPLOYER (Number, street, city, State, zip code): 3319 St. Lawrence Drive, Toledo, Ohio 43605

35. IF ACCIDENT OCCURRED OUTSIDE THE U.S. STATE WHETHER YOU [ ] ARE [ ] ARE NOT A U.S. CITIZEN [ ] YES [ ] NO

36. SIGNATURE OF PERSON CLAIMING COMPENSATION: x Joseph Duris

37. DATE: 1-15-76

RECEIVED
FEB 11 1976
OWCP
NINTH DIST.
LONGSHORE

A6

Exhibit 3

LEAVE THIS SPACE BLANK

Case No. 9 4012
Insurance Carrier's No. 211 SE 3862

U. S. DEPARTMENT OF LABOR
EMPLOYMENT STANDARDS ADMINISTRATION
OFFICE OF WORKMEN'S COMPENSATION PROGRAMS

2 11 76

OFFICE OF DEPUTY COMMISSIONER

Administering Longshoremen's and Harbor Workers' Compensation Act, as extended

---

NOTICE TO EMPLOYER AND INSURANCE CARRIER THAT CLAIM HAS BEEN FILED

Gentlemen:

Enclosed is a copy of a claim for compensation which has been filed by Joseph E.Duris by his attorney, William Culbert under the Longshore Act.

You should proceed to pay compensation promptly when due as provided by Section 14 of the Longshoremen's and Harbor Workers' Compensation Act and to furnish medical treatment in accordance with Section 7(a) and (b) thereof, unless liability to pay compensation is controverted.

Section 14(d) provides that if the employer controverts the right to compensation he shall file with the deputy commissioner, on or before the 14th day after he has knowledge of the alleged injury or death, a notice stating that the right to compensation is controverted, the name of the claimant, the name of the employer, the date of the alleged injury or death, and the grounds upon which the right to compensation is controverted.

Under the regulations of this Office where claim is filed the employer or insurance carrier is required to file answer thereto within ten days from the date notice is received that claim has been filed.

Forms of notice of controversy and answer are enclosed for use in the event the right to compensation is controverted and the claim is to be opposed.

The original notice and answer should be filed with the deputy commissioner at the above office and copy thereof served upon the claimant either personally or by mailing it to the address given in the claim if you deny liability. Otherwise you should proceed to pay compensation immediately as provided by the said Act.

Sincerely,

John P. Traynor
Deputy Commissioner
Underwriters Adj. Co.
Enclosure
3450 W. Central Ave.
Toledo,Ohio 43606
Mr. Barber:.

Ltr. LS-21ja
Rev. June 1973

Exhibit 4

U.S. DEPARTMENT OF LABOR
Employment Standards Administration
Office of Workmen's Compensation Programs

1240 East Ninth Street
Cleveland, Ohio 44199

Memorandum of Conference File No. 9 4012

Joseph E. Duris

vs.

Toledo Overseas Terminals
Underwriters Adjusting Co.

Toledo, Ohio. August 19, 1976.

A Conference was held in this case on 8 19 76. Mr. Joseph E. Duris, the claimant, was represented by his attorney, Mr. William Culbert. Mr. Paul Wegner was present on behalf of the insurance carrier, the Underwriters Adjusting company.

The case was discussed. Mr. Duris is being paid compensation for Temporary Total Disability. He is still under the care of Dr. Rosenblatt. A Third Party Action is being contemplated.

It is recommended that the carrier continue payments of compensation until such time as facts or circumstances warrant termination or modification of such payments.

The carrier is requested to furnish copies of medical reports available to them regarding the condition of Mr. Duris. Mr. Culbert is request to furnish copies of medical reports that are not in the posession of the carrier. These reports should be forwarded to this office within 20 days of the date of this Memorandum.

John P. Traynor
Deputy Commissioner

9 2 76.

Mr. Joseph Duris
Mr. William Culbert, Attorney
Mr. Paul Wegner, Underwriters Adjusting Co.

Exhibit 5

U.S. DEPARTMENT OF LABOR
EMPLOYMENT STANDARDS ADMINISTRATION
OFFICE OF WORKERS' COMPENSATION PROGRAMS

MEMORANDUM OF INFORMAL CONFERENCE

(Under the Longshoremen's and Harbor Workers' Compensation Act, as extended)

1. Claimant	2. OACP File Number
Joseph Duris	9 4012
3. Employer	**4. Carrier Employer's Number**
Toledo Overseas Terminals	
5. Insurance Carrier	
Underwriters Adj. Co.	
6. Date of Conference (Month, day, year)	**7. Date of Injury** (Month, day, year)
2 17 77	5 19 75

8. Appearances:

[X] Claimant present [ ] Claimant not present

For Claimant Att. Wm. Culbert For Employer/Carrier Jerry Barber; Dave Gillian

Issues:
Continuance of Temporary Total
Rehabilitation process
Third Party Issue
Schedule of Loss of Wage Earning Capacity

See Recommendation.

cc/Rehab

9. The claimant sustained/alleges an accidental injury on the date in item 7 while working for the above-named employer, under the circumstances bringing the injury within the purview of the LHWC Act (33 U.S.C 901 et seq.) or an extension thereof, resulting in the following injury(ies):

Multiple injuries resulting from serious injury due to fall
Back Injury
Left Foot

10. Prior conferences were held on 8 19 76 Refer File
the employer/carrier have paid compensation for this injury in the amount of $ 6711.00
for the following periods: Med. $6404. (Approx)

Paid Temp. Total from date of injury to present and contin.

11. Present Claim:

Is being paid temp. total as carrier accepts present disability as precluding return to regular duty. Will attempt to discuss with employer possibility of returning to work on light duty (checker)

12. Employer/Carrier's Position

Accepts above.

13. Average Weekly Wage (Sec. 10) $ Min. $74.57 Comp rate [ ] As stipulated by parties [X] As recommended by examiner

14. Compensation rate (2/3 x Ave.) $74.57

Form LS-263
Dec. 1974

15. Claimant

- ☐ Returned to work on
- ☐ Has not returned to work
- ☐ Did not lose time

16. Medical costs related to the injury

- ☐ have been paid
- ☐ have not been paid

by the employer

Upon discussion of the issues involved among those present, together with due consideration to all information in the administrative file, the following recommendation is made.

RECOMMENDATION

Compensation is to be paid as follows:

Case should continue in present posture; claimant and carrier should attempt to obtain light duty work. Claimant states he does not want now active Rehab. work on his case but wants to attempt to return as a Checker. Carrier should note.

It is assumed that case will be finalized by Third Party Action. Parti should advise us of status of third party action.

Parties should advise us of any developments. Claimant is entitled to schedule(s) if third party action does not materialize.

Case file review by Rehab Institute as noted by carrier or Labor Rehab indicated. Medical review by Dr. Gosling as noted by carrier.

FEE

Approved Fee: Fee not set. Attorney must petition for fee in this matter as per regulations. Attorney should contact office for further info.

A written application for fee for services rendered has been submitted and duly considered, and accordingly, the above fee *(to include expenses)* is approved in favor of:

- ☑ This fee is for an attorney and is made a lien on the compensation recommended.
- ☐ There is no lien on the compensation.
- ☐ The fee is to be assessed to the employer or carrier

ACTION BY EMPLOYER CARRIER

The self-insured employer or insurance carrier is to submit Forms LS-206 or LS-208, showing compliance with the above recommendation. Upon completion of payment, a final Form LS-208 is to be submitted.

In the event of controversion, Form LS-207 is to be submitted.

To avoid statutory penalties all required forms should be sent to this office promptly and within the time requirements of the Act.

H. Levinson Examiner.

(Claims Examiner)

2 22 77.

(Date this memorandum issued)

(See 20 C.F.R. 701 et seq. for LHWC Act Regulations)

Exhibit 6

U.S. DEPARTMENT OF LABOR EMPLOYMENT STANDARDS ADMINISTRATION, OFFICE OF WORKERS' COMPENSATION PROGRAMS	MEMORANDUM OF INFORMAL CONFERENCE (Under the Longshoremen's and Harbor Workers' Compensation Act, as extended)

1. Claimant	2. OWCP File Number
Joseph Duris 9-401	
3. Employer	**4. Carrier Employer's Number**
Toledo Overseas Terminal, Inc	211 SE 3852
5. Insurance Carrier	
Seaboard Fire & Marine - Underwriters Adjusting Company	
6. Date of Conference (month, day, year)	**7. Date of Injury** (month, day, year)
September 22, 1978	May 10, 1975

8. Appearances:

[X] Claimant present [ ] Claimant not present

For Claimant Atty: Mr. Culbert For Employer Carrier Attys: Joseph Tuley

Issues:

Residuels of injury under Seciten 8

Admiralty Recovery

9. The claimant sustained/alleges an accidental injury on the date in item 7 while working for the above-named employer, under the circumstances bringing the injury within the purview of the LHWC Act (33 U.S.C. 901 et seq.) or an extension thereof, resulting in the following injury(ies):

Multiple body injury

10. Prior conferences were held on February 17, 1977 the employer/carrier have paid compensation for this injury in the amount of $ Paid Temporary Total for the following periods:

11. Present Claim:

Refer 8

12. Employer/Carrier's Position

In abeyance pending admiralty claim.

13. Average Weekly Wage (Sec. 10) $	14. Compensation rate (2/3 x 13)
[ ] As stipulated by parties [ ] As recommended by examiner	not established

15. Claimant	16. Medical costs related to the injury
[X] Returned to work on April 21, 1977 [ ] Has not returned to work [ ] Did not lose time	[ ] have been paid [ ] have not been paid by the employer

Upon discussion of the issues involved among those present, together with the evidence in the administrative file, the following recommendation is made.

RECOMMENDATION

Compensation is to be paid as follows:

Mr. Culbert should determine average wage for claimant as file indicates he has not been paid correctly. Mr. Culbert stated he WISHED file held in abeyance pending admiralty suite.

FEE

Approved Fee: not relevant

A written application for fee for services rendered has been submitted and duly considered, and accordingly, the above fee *(to include expenses)* is approved in favor of:

[ ] This fee is for an attorney and is made a lien on the compensation recommended.
[ ] There is no lien on the compensation.
[ ] The fee is to be assessed to the employer or carrier.

ACTION BY EMPLOYER CARRIER

The self-insured employer or insurance carrier is to submit Forms LS-206 or LS-208, showing compliance with the above recommendation. Upon completion of payment, a final Form LS-208 is to be submitted.

In the event of controversion, Form LS-207 is to be submitted.

To avoid statutory penalties all required forms should be sent to this office promptly and within the time requirements of the Act.

H. Levinson
(Claims Examiner)

October 1, 1979
(Date this memorandum issued)

(See 20 C.F.R. 701 et seq. for LHWC Act Regulations)

Exhibit 7

U.S. DEPARTMENT OF LABOR EMPLOYMENT STANDARDS ADMINISTRATION OFFICE OF WORKERS' COMPENSATION PROGRAMS	MEMORANDUM OF INFORMAL CONFERENCE (Under the Longshoremen's and Harbor Workers' Compensation Act, as extended)

1. Claimant	2. OWCP File Number
Joseph Duris	9-4012
3. Employer	**4. Carrier/Employer's Number**
Toledo Oversees Terminal, Inc.	211-SE-3562
5. Insurance Carrier	
Underwriters Adjusting Company	
6. Date of Conference (Month, day, year)	**7. Date of Injury** (Month, day, year)
October 23, 1980	May 19, 1975

8. Appearances:

[X] *Claimant present* [ ] *Claimant not present*

For Claimant Attorney William Culbert For Employer/Carrier Joe Duley, Claims Manager
Robert M. Foster, Senior Adjuste

Issues: Compensation for Permanent Partial Disability.

9. The claimant sustained/alleges an accidental injury on the date in item 7 while working for the above-named employer, under the circumstances bringing the injury within the purview of the LHWC Act (33 U.S.C 901 *et seq.*) or an extension thereof, resulting in the following injury(ies):

Fell from ladder aboard ship onto dock. Accident resulted in a brokeen wrist, ankle and fractured back.

10. Prior conferences were held on _____
the employer/carrier have paid compensation for this injury in the amount of $ 7516.75
for the following periods: May 19, 1975 thru April 21, 1977.

11. Present Claim: Permanent partial disability for loss of use of the right wrist/hand left ankle and broken back.

12. Employer/Carrier's Position Upon receipt of the medical evaluation for permanent partial disability the carrier will give consideration of a settlement. Also the carrier will consider allocation for a certain amount of money for the special shoes for 20 year period for the claimant.

13. Average Weekly Wage (Sec. 10) $ _____ [ ] As stipulated by parties [ ] As recommended by examiner	14. Compensation rate (2/3 x AWW) $74.57 (Minimum)

5. Claimant

☒ Returned to work on April 22, 1977

☐ Has not returned to work

☐ Did not lose time

6. Medical costs related to the injury

☒ have been paid ☐ have not been paid by the employer

Upon discussion of the issues involved among those present, together with due consideration to all information in the administrative file, the following recommendation is made.

RECOMMENDATION

Compensation is to be paid as follows: It is recommended that current medical evaluation be done to show the permanent partial disability in percentage terms for the wrist/hand, ankle/foot, and back. Claimant incurred a fracture of the 3rd vertebra. No compensation is presently being paid. The last medical report by Dr. Hed B. Hein, M.D., is dated February 8, 1979. A Third Party claim has been filed. This does not prevent the interested parties to negotiate a settlement figure for permanent partial disability in this case. Claimant will be referred to Dr. Hein for an up-to-date evaluation. The carrier will refer claimant to a doctor of their choice if necessary.

This case is being held open for 45 days pending the medical report and the negotiation of the interested parties.

FEE

Approved Fee: Pending

A written application for fee for services rendered has been submitted and duly considered, and accordingly, the above fee *(to include expenses)* is approved in favor of:

☒ This fee is for an attorney and is made a lien on the compensation recommended.

☐ There is no lien on the compensation.

☐ The fee is to be assessed to the employer or carrier.

ACTION BY EMPLOYER/CARRIER

The self-insured employer or insurance carrier is to submit Forms LS-206 or LS-208, showing compliance with the above recommendation. Upon completion of payment, a final Form LS-208 is to be submitted.

In the event of controversion, Form LS-207 is to be submitted.

To avoid statutory penalties all required forms should be sent to this office promptly and within the time requirements of the Act.

Ruby L. Fallow

(Mrs.) Ruby L. Walton
(Claims Examiner)

October 30, 1980
(Date this memorandum issued)

cc: Mr. Duris cc: Attorney Culbert cc: Joe Duley cc: Robert Foster
(See 20 C.F.R. 701 et seq. for LHWC Act Regulations) cc: Employer